Filed 3/5/19 P. v. Rodriguez CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JASON ROY RODRIGUEZ, Defendant and Appellant.	H042655 (Santa Clara County Super. Ct. No. C1492995)

A jury convicted defendant Jason Roy Rodriguez of a number of crimes, including possession of a controlled substance for sale (Health & Saf. Code, § 11378.5). Rodriguez contends on appeal that the trial court erred in its response to a question from the jury, effectively lowering the prosecution's burden of proof. Finding no error, we affirm.

I. FACTS AND PROCEDURAL BACKGROUND

Rodriguez was charged by information with possession of phencyclidine (PCP) for sale (Health & Saf. Code, § 11378.5; count 1);[1] misdemeanor using or being under the influence of a controlled substance (§ 11550, subd. (a); count 2); and misdemeanor vandalism (Pen. Code, § 594, subds. (a)–(b)(1); count 3). The information alleged that all three crimes occurred "on or about June 25, 2014." The information also alleged that

[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

Rodriguez had two prior convictions for section 11550 and had previously committed a violent or serious felony (strike prior) (Pen. Code, §§ 667, subds. (b)–(i), 1170.12).

The jury found Rodriguez guilty of all counts. The trial court conducted a court trial on the prior crime allegations and found them to be true. At sentencing, the trial court denied Rodriguez's request that the court strike his strike prior and sentenced Rodriguez to eight years in prison on count 1 and 180 days in county jail on counts 2 and 3, to run concurrently with each other and count 1.

Four witnesses testified at Rodriguez's trial. Lilia Pantoja testified that she lived on Doris Avenue in San Jose across the street from Rodriguez. For the previous couple of years, Pantoja had seen strangers coming in and out of Rodriguez's house "at all hours." Pantoja had called the police several times to report this behavior.

Dominic Campbell was Pantoja's nephew and lived with her on Doris Avenue. On June 25, 2014, at around 4:30 p.m., Rodriguez tried to break into Pantoja and Campbell's house and shattered the living room window. Rodriguez was "ranting" and began pacing around Campbell's house. Rodriguez then walked back across the street to his house. Campbell called 911. After the police arrived, Campbell saw a small plastic bag on the street outside his house in the direction of Rodriguez's house. Campbell had not seen the bag earlier that day, and he did not see Rodriguez drop the bag.

Daniel Collins was an officer with the San Jose Police Department (SJPD). Collins was one of the officers dispatched to Doris Avenue in response to Campbell's 911 call and testified as an expert in recognizing usable amounts of PCP and in PCP's effect on the body. Collins testified that Rodriguez was wearing shorts with pockets but no shirt on the day of the incident, and Rodriguez had a tattoo of the letters "P.C.P." on his right chest. When Collins spoke with Rodriguez, Rodriguez's answers were "bizarre." Collins "couldn't get a straight answer out of [Rodriguez,] like he was falling asleep." Collins had to keep talking to Rodriguez to wake him back up. Rodriguez did not appear to understand the officers' instructions and acted as if he "may have been

under the influence of alcohol, really drunk." Based on his interactions with Rodriguez that day, Collins believed that Rodriguez exhibited symptoms consistent with having used a narcotic. Collins concluded that Rodriguez was under the influence of PCP. One of the other officers then arrested Rodriguez.

Officer Collins collected the plastic bag that Campbell saw outside his house. Based on its smell and appearance, Collins suspected that the substance in the bag was PCP. Collins administered a chemical test that indicated the substance was PCP. The officers did not find scales, cash, guns, or other plastic bags when they searched Rodriguez.

The parties stipulated that Rodriguez "intentionally did a wrongful act" when he broke the window at Pantoja and Campbell's house; that Rodriguez had PCP in his blood on June 25, 2014; and that the plastic bag found outside Campbell's house contained 9.43 grams of PCP.

Robert Navarro, a detective with the Santa Clara County Sheriff's Office, testified as an expert in the sale, use, and effects of PCP. PCP is typically ingested by smoking a hand-rolled cigarette to which PCP has been added. A single cigarette contains approximately .1 grams of PCP. For a new user, .2 grams of PCP can be a lethal dose; for a person with a high tolerance for the drug, a lethal dose can range from .3 to .5 grams.

Navarro testified that mid-level distributors of PCP possess anywhere from one ounce to one pound of PCP. Mid-level and street-level distributors of PCP may themselves use the drug and also sell it to "supplement their use." For the "street" weight of PCP, "one gram" actually weighs .7 grams. This amount of PCP typically costs anywhere from $80 to $100. The PCP found in the plastic bag outside Campbell's house was worth about $1,000 and was equivalent to approximately 94 individual-use amounts of PCP. This amount is more than someone could take over the course of a week.

Navarro testified that 9.43 grams of PCP is consistent with an amount of PCP for sale, rather than personal use, although there is no limit on how much an individual user could purchase for his or her own use. In addition, 9.4 grams of PCP packaged in a plastic bag without any other kind of packaging would most likely have been recently purchased from a large-scale distributor. That amount would likely be further broken down into smaller units before it was sold.

Navarro also testified that a "stash house" is a location used by distributors to house narcotics or the proceeds of drug sales. A "stash house" generally features heavy foot traffic, security cameras, and multiple locations for entry and exit, among other characteristics.

Rodriguez did not testify, although the jury heard a recording of a call Rodriguez made from jail.[2] The transcript of the call (which the jury viewed but was not itself admitted as evidence) indicates that Rodriguez stated on the call, "They're trying to get me on a possession, [*sic*] but I didn't have nothing on me, it was, they found like a big old sack, and, on the street, but it was not, it wasn't on my possession [*sic*]. But anyways, um, ugh, it was like a baseball size of PCP, so I'm gonna fight it."

As to the possession for sale charge (count 1), the trial court gave the jury a modified version of CALCRIM No. 2302. Among other elements, the jury was told that the People must prove that "1. The defendant possessed a controlled substance" and "4. When the defendant possessed the controlled substance, he intended to sell it." The instruction stated, "A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it, either personally or through another person." The instructions informed the jury that this crime requires a specific intent and "[f]or you to find a person guilty of this crime, that person must not only intentionally commit the prohibited act but must do so with a specific intent. The act and the specific

[2] The parties stipulated that Rodriguez made the call.

intent required are explained in the instruction for that crime." (CALCRIM No. 252.) The trial court gave the jury instructions for simple possession of a controlled substance (CALCRIM No. 2304) as a lesser offense for count 1. The verdict form for count 1 did not include any reference to the date on which Rodriguez was alleged to have committed the offense.[3]

In his closing argument, the District Attorney argued that Rodriguez possessed the PCP for sale. "[T]hat amount is not going to be consumed by one person. And, again, this notion that he was high at 4:30 or under the influence does not mean that at some point when he had this big ol' [*sic*] sack of P.C.P. and he got it [*sic*]. He wasn't going to sell. At least some, if not most of it." Defense counsel argued there was reasonable doubt whether Rodriguez possessed the PCP at all. Defense counsel noted that "[t]he district attorney has to prove that he had the intent to sell on the day in question," and Rodriguez, as a long-time user, could have possessed a large amount of PCP to use over an extended period of time. Defense counsel highlighted Rodriguez's bizarre behavior immediately prior to his arrest: Rodriguez "was acting out of his mind. . . . [W]hen you show that he had the intent to sell, you have to show that he had those plans. [¶] We have a person who is acting so bizarre that the officer said I thought he may be drunk. . . . [¶] Now the district attorney wants you all to believe that that is equivalent to someone who's engaging in a drug enterprise, that he is able to advertise and conduct a transaction for selling the P.C.P. of 9 grams. But Officer Collins can't even get him to talk coherently."

[3] The jury was not instructed on CALCRIM No. 207, which states that the People are not required to prove that the crime took place exactly on the day of the charged crime "but only that it happened reasonably close to that day." (CALCRIM No. 207.) There is no explanation in the record on appeal, which does not contain a reported conference regarding jury instructions, why the trial court omitted this instruction.

During deliberations, the jury requested to hear Detective Navarro's testimony, in particular, the "[p]art that included the amount for sale/personal use."[4] Later in deliberations the jury submitted a question to the court that asked "Does the intent to/for sale-is that limited to the day arrested or any future date/time[?] Is there a time frame to consider for intent to/for sale[?]" (Some capitalization omitted.)

In response to this question, defense counsel requested that the trial court simply direct the jury to element 4 of the jury instruction for count 1. The District Attorney asked the trial court to respond to the jury's specific question by stating "no." The District Attorney additionally requested that the trial court tell the jury that the intent was not limited to the day of the arrest, and the intent needed to occur when the defendant possessed the controlled substance. Defense counsel objected to the District Attorney's proposed wording. After hearing from counsel, the trial court instructed the jury "Intent to sell can occur at any time defendant is in possession of the drug. Please see element number 4 of Instruction 2302. It does not have to occur on the day of arrest." Later during deliberations, the jury requested to hear Pantoja's testimony "about activities or what she testified to about house traffic and what she saw." After further deliberation, the jury convicted Rodriguez of all crimes. Rodriguez timely appealed.

II. DISCUSSION

Rodriguez argues that the original instructions given by the trial court, based on CALCRIM No. 2302, accurately stated the elements of possession of a controlled substance for sale as charged in count 1. (See *People v. Montero* (2007) 155 Cal.App.4th 1170, 1177 (*Montero*) ["CALCRIM No. 2302 captures all of the elements of the crime of possession for sale."].) Rodriguez contends that the trial court erred in the wording of its response to the jury's question because it should only have "direct[ed] the jury to element number 4 of CALCRIM 2302" and should not have included any additional language in

[4] The jury also requested a copy of the stipulations.

its answer. In particular Rodriguez states that, because he was alleged only to have possessed the PCP for sale on a particular date, "the prosecutor carried the burden of proving that on that same date—the limited period of time for which possession was proven—that Rodriguez also possessed the specific intent to sell the PCP." By telling the jury that it could consider whether Rodriguez possessed the PCP at another time, the trial court's answer "signaled the jury to veer towards a guilty verdict."

The Attorney General counters that the trial court's answer was a correct statement of the law because the information charged Rodriguez with possessing PCP for sale "[o]n or about June 25, 2014." The Attorney General contends that the jury did not have to find that Rodriguez had the intent to sell PCP on the day of his arrest in order find him guilty of violating section 11378.5. Because possession of a controlled substance is a "continuing offense," "the jury reasonably could have convicted appellant of the crime if it found beyond a reasonable doubt that all the elements (including the specific intent element) were met at the time of appellant's arrest, at a time prior to his arrest, or both." To the extent that Rodriguez contends that the trial court read the information "too broadly" when it considered the "on or about" language in the information when responding to the jury's question, Rodriguez has forfeited this contention by failing to specify it in its objection to the trial court.

"We review de novo the legal accuracy of any supplemental instructions provided." (*People v. Franklin* (2018) 21 Cal.App.5th 881, 887.) "Where the original [jury] instructions are themselves full and complete, the court has discretion under [Penal Code] section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. Indeed, comments diverging from the standard are often risky. But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely

reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 (*Beardslee*), citations omitted.)

We turn first to the Attorney General's contention that Rodriguez has forfeited his challenge on appeal to the supplemental instruction. As defense counsel objected to the trial court's proposed wording of its answer to the jury's question, we reject the Attorney General's argument of forfeiture. However, we conclude that the trial court's answer was not erroneous.

With respect to the intent element of possession for sale, the jury asked, "is that limited to the day arrested *or any future date/time*[?] Is there a time frame to consider for intent to/for sale[?]" (Some capitalization omitted and italics added.) Rodriguez contends that the trial court's answer was erroneous because the answer told the jury that it could consider whether Rodriguez possessed the PCP at another time. However, we read the jury's question and the trial court's answer as focused—not on Rodriguez's *possession* of the drug—but on when *the sale* of the drug (as reflected in his intent to sell) could occur. The trial court stated "Intent to sell can occur at any time defendant is in possession of the drug. Please see element # 4 of Instruction 2302. It does not have to occur on the day of arrest." The fourth element of CALCRIM No. 2302, in turn states, "When the defendant possessed the controlled substance, he intended to sell it."

"When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner." (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) Here, in addition to the instructions specifically relating to count 1, the jury was told that they must decide the facts and "what happened, based only on the evidence that [was] presented to [them] in this trial." (CALCRIM No. 200.) The jury heard no evidence that Rodriguez possessed the PCP on any day other than on the date of his arrest—that is, on June 25, 2014. The jury did, however, hear evidence that

Rodriguez had sold narcotics on other days through Pantoja's testimony about strangers coming to Rodriguez's house "at all hours." Indeed, after asking the question that is the subject of this appeal, the jury next requested to hear Pantoja's testimony related to this issue.

Seen in context, the jury's question went to whether *the sale* of the PCP, if they found Rodriguez harbored an intent to sell it on June 25, 2014, could occur in the future—and not whether Rodriguez's possession could occur at some other time. The jury's question makes sense both in light of the testimony of Officer Collins that Rodriguez was barely coherent immediately before his arrest, and defense counsel's argument that someone behaving in this way could not form the intent to sell. The court's answer responded to these issues as addressed by the jury's specific inquiry: "Is there a time frame to consider for intent to/for sale."

The trial court correctly told the jury that the intended sale could occur in the future, even as the trial court highlighted (through its reference to the fourth element of the jury instruction for the crime) that Rodriguez's intent to sell and his possession of PCP had to occur at the same time. This answer correctly states the law. A person can be guilty of possession with intent to sell either if they personally intend to sell the drug or if they possess it with the intent that someone else will sell it (which necessarily will occur at some time in the future). (See *People v. Parra* (1999) 70 Cal.App.4th 222, 227; *People v. Lua* (2017) 10 Cal.App.5th 1004, 1015.) Read as a whole, the trial court's instructions did not tell the jury that they could convict Rodriguez of count 1 based on his possession of PCP at some time other than during the events that were the subject of the evidence presented at his trial.

We also reject Rodriguez's contention that the wording of its answer reflects that the trial court was acting as "an advocate, either endorsing or redirecting the jury's inclination." (*Montero, supra,* 155 Cal.App.4th at p. 1180.) We do not agree with this

characterization and conclude that the trial court did not abuse its discretion in electing to specifically answer the jury's question. (See *Beardslee*, *supra*, 53 Cal.3d at p. 97.)

We do agree with Rodriguez that the trial court's answer, and particularly the use of the ambiguous word "it" in the last sentence of the trial court's response, could have been more clearly worded. Nevertheless, read in the context of the jury's question, and with its emphasis on the wording of element 4 of the jury instruction (which Rodriguez agrees was itself a correct statement of the law), we discern no error in the trial court's supplemental instruction.

III. DISPOSITION

The judgment is affirmed.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

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